

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 198

MAURO JOHN MONTANA, PETITIONER,

vs.

WILLIAM P. ROGERS, ATTORNEY GENERAL
OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1960
CERTIORARI GRANTED OCTOBER 17, 1960

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APPENDIX.

1

**IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division**

MAURO JOHN MONTANA,

Plaintiff,

vs.

**WILLIAM ROGERS, Attorney General
of the United States,**

Defendant.

No. 58 C 1620

**STATEMENT PURSUANT TO RULE 12(c)
OF THE UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT**

This cause was instituted by the filing of a Complaint on September 3, 1958; the original parties to the action were Mauro John Montana, Plaintiff, and William Rogers, Attorney General of the United States and Edward P. Ahrens, Chicago District Director of Immigration and Naturalization, Defendants; an answer thereto was filed November 10, 1958, an amended complaint was filed March 25, 1959, to which answer was filed May 5, 1959; on April 29, 1959, Edward P. Ahrens was dismissed as a party defendant and Count 2 of the amended complaint was dismissed, both on motion of the Government; trial was had on Count 1 of the amended complaint and the answer thereto on November 16, 1959, before the Honorable Julius H. Miner; no questions were referred; pursuant to said trial, judgment was entered in favor of 2 the defendant, William Rogers, Attorney General of the United States and the complaint dismissed pur-

suant to Findings of Fact and Conclusions of Law filed November 20, 1959. Notice of Appeal was filed by the plaintiff December 1, 1959.

/s/ Anna R. Levin

Anna R. Levin,

Attorney for Plaintiff-Appellant,

Mauro John Montana.

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UNITED STATES DISTRICT COURT

(Caption—No. 58 C 1620) * *

ANSWER

(Filed Nov 14 1958)

Now comes the defendant, William Rogers, Attorney General of the United States, by R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, and for answer to plaintiff's complaint states as follows:

1. Defendant admits the allegations of Paragraph 1 of plaintiff's complaint.
2. Defendant admits the allegations of Paragraph 2 of plaintiff's complaint.
3. Defendant admits the allegations of Paragraph 3 of plaintiff's complaint.
3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of plaintiff's complaint and neither admits nor denies the same, but demands strict proof thereof.
- 10 5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5 of plaintiff's complaint and neither admits nor denies the same, but demands strict proof thereof. For further answer to the allegations of

Paragraph 5 of plaintiff's complaint, defendant admits that Maddelena Mondano has never relinquished or lost her status as a United States citizen if in fact, she ever possessed such status.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of Paragraph 6 of plaintiff's complaint, and neither admits nor denies the same, but demands strict proof thereof.

7. Defendant admits the allegations of Paragraph 7 of plaintiff's complaint that the said Maddelena Mondano sojourned to Italy in 1906, and as to the remaining allegations of Paragraph 7 of plaintiff's complaint, defendant states that he is without knowledge or information sufficient to form a belief as to their truth and demands strict proof thereof.

8. Defendant denies the allegations of Paragraph 8 of plaintiff's complaint.

9. Defendant denies the allegations of Paragraph 9 of plaintiff's complaint.

10. Defendant admits the allegations of Paragraph 10 of plaintiff's complaint that plaintiff was born outside the continental limits of the United States and as to the remaining allegations of Paragraph 10 of plaintiff's complaint, defendant states that he is without knowledge or information sufficient to form a belief as to their truth and demands strict proof thereof.

11. Defendant admits the allegations of Paragraph 11 of plaintiff's complaint that following the sojourn of the said Maddelena Montana to Italy, the said Maddelena Montana returned to the United States some time subsequent to July 30, 1906, and as to the remaining allegations of Paragraph 11 of plaintiff's complaint, defendant states he is without knowledge sufficient to form a belief as to their truth; and demands strict proof

Motion for Discovery and Production

thereof. For further answer to Paragraph 11 of plaintiff's complaint, defendant states that prior to 1924, an United States citizen did not require an United States passport to re-enter the United States.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12, but demands strict proof thereof.

13. The allegations of Paragraph 13 of plaintiff's complaint are matters peculiarly within the knowledge of plaintiff and defendant, neither admits nor denies the same, but demands strict proof thereof.

14. Defendant admits the allegations of Paragraph 14 of plaintiff's complaint.

12-25 • • •

26 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

MOTION FOR DISCOVERY AND PRODUCTION
OF DOCUMENTS
(Filed Mar 18 1959)

Now comes the plaintiff, Mauro John Montana, by his attorney, Anna R. Lavin, and moves the Court for the entry of an order requiring defendants to produce and permit the inspection and copying by the plaintiff of the following documents, and as a basis therefor says that the said documents are necessary in proper and adequate presentation on trial of the allegations of his Amended Complaint and that the whereabouts and obtaining of said documents are available to defendants and beyond the reach of the plaintiff:

1. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Lena

(Madeline) Montana (Mondano) and filed with, or issued by or maintained in any of the agencies of the Department of Justice, State and Labor for the period commencing September 1, 1905, through and including October 1, 1906, during which said period the aforesaid Lena Montana departed this country and re-entered via the port of New York City, New York;

27. 2. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Mauro John Montana filed with, or issued by, or maintained in any of the agencies of the Departments of Justice, State and Labor, for the period commencing September 1, 1905, through and including October 1, 1906;

3. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor, by or on behalf of any child of Lena (Madeline) Montana (Mondano) filed with, or issued by or maintained in any of the agencies of the Departments of Justice, State and Labor for the period commencing September 1, 1905 through and including October 1, 1906;

4. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Lena (Madeline) Montana (Mondano) filed with the Consular's Service of the United States at Naples, Italy, and maintained in its records, or in the records of the Department of State or the Department of Labor for the period commencing October 1, 1905, through and including October 1, 1906;

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Amended Complaint

5. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Mauro John Montana, filed with the Consular's Service of the United States at Naples, Italy, and maintained in its records, or in the records of the Department of State or the Department of Labor, for the period commencing October 1, 1905, through and including October 1, 1906;
6. Certificate of Arrival (Department of Labor) No. 541860 relating to Mauro John Montana.

/s/ Anna R. Lavin

Anna R. Lavin

Attorney for Plaintiff

One North LaSalle St.
Chicago 2, Illinois
RAndolph 6-7855

29 IN THE UNITED STATES DISTRICT COURT

* * * (Caption—No. 58 C 1620) * * *

AMENDED COMPLAINT

(Filed Mar 25 1959)

Now comes the plaintiff, Mauro John Montana, by his attorney, Anna R. Lavin, and with leave of court first had and obtained, files this Amended Complaint against the defendants, William Rogers, as Attorney General of the United States, and Edward P. Ahrens, District Director, Immigration and Naturalization Service, Chicago, Illinois, and states as follows.

Count I

1. The jurisdiction of this Court is invoked and these proceedings are instituted against the defendant under

Section 1503 of Title 8 of the Nationality Act of 1952 (8 U.S.C. 1503), for a judgment declaring the plaintiff to be a citizen and national of the United States of America.

30. 2. Defendant, William Rogers, is the duly appointed qualified and acting Attorney General of the United States. The Immigration and Nationality Service is a department of the defendant and under his direction and control.

3. Defendant, Edward P. Ahrens, is the duly appointed and acting District Director of the Immigration and Naturalization Service, Chicago, Illinois.

4. Plaintiff Mauro John Montana is a permanent resident of the Village of LaGrange, within the Northern District of Illinois and claims his permanent residence within the jurisdiction of this Court.

5. Plaintiff is the true and lawful blood child of Maddelena Montana, who is a native born citizen of the United States.

6. Maddelena Montana was born in Jersey City, New Jersey, on the 2nd day of October, 1890 of Giovanni Mondano and Rose Mondano, his wife, both of whom were naturalized citizens of the United States at the time of the birth of the said Maddelena Montana.

7. Maddelena Mondano, from the 2nd day of October, 1890 to and on about the 2nd day of February, 1906, was continuously within the continental limits of the United States.

8. On or about the 3rd day of January, 1905, the said Maddelena Mondano married one Giuseppa Montana in Bayonne, New Jersey.

31. 9. The said Maddelena Montana, journeyed to Italy on or about the 2nd day of February, 1906, accompanied by her husband and her parents as aforesaid. She departed from New York City in January of

Amended Complaint

1906, at which time she was already pregnant with said child and on February 2, 1906, when she arrived at Naples, Italy, her pregnancy was in the fifth month.

10. That approximately two months thereafter she attempted to return to the United States and was prevented from so doing by and through the actions of the then acting and duly constituted American Consul, the highest ranking United States official in the province of Naples, Italy, where she was visiting.

11. The prohibition of the aforesaid American Consul continued to, and included, approximately the 30th day of July, 1906.

12. That, theretofore, on, to-wit the 26th day of June, 1906, there was born to the said Maddelena Montana, at Acerra, Italy, a son, Mauro John Montana, the plaintiff here.

13. That on or about the aforesaid 30th day of July, 1906, Maddelena Montana entered the United States traveling on a United States passport, recognizing her as a citizen of the United States, accompanied by the plaintiff whose name and/or description was endorsed on the said United States passport.

14. That, from the 30th day of July, 1906, to the present, the plaintiff has never been without the continental limits of the United States.

15. That on the 1st day of August, 1924, and other times prior and subsequent thereto, the plaintiff had and has pledged allegiance to the United States of America and has renounced all foreign sovereigns, powers and potentates.

16. That on or about the 7th day of January, 1958, the plaintiff was served by the Immigration and Nationality Service with an order to show cause why he should not be deported which said order to show cause is incorporated and identified in immigration file No. A4 973-720.

17. That deportation hearing proceedings commenced on the 15th day of January, 1958; that, from the inception of that hearing, questions as to the jurisdiction of the hearing officials was raised and eventually affirmatively challenged with a demand for termination of said immigration proceedings because of the claimed United States citizenship of the plaintiff.

18. The plaintiff's demand for termination of the immigration proceedings seeking deportation, on the ground of want of jurisdiction because of his citizenship of the United States, was denied and the hearing proceeded, with the plaintiff refusing to take further part thereafter.

19. The plaintiff contends that the denial and refusal of the Immigration and Nationality Service at Chicago, Illinois to terminate the deportation proceedings, on 33 the ground that he was a citizen of the United States, is a denial of his right as a citizen of the United States.

20. On or about the 10th day of September, 1958, the District Director of Immigration and Naturalization (predecessor of the defendant Edward P. Ahrens) by and through his subordinate, Roy Anadell, Assistant Director for Deportation, Chicago District informed this plaintiff that his deportation has been directed, and the plaintiff verily believes said defendant intends to continue and proceed with said deportation and will do so, unless restrained by an injunction of this Court.

21. The plaintiff contends that the matters and things described in paragraph 20 hereinabove constitute a denial of a right of plaintiff as a citizen of the United States, which denial is based on the alleged ground that he is not a citizen of the United States.

22. Plaintiff is a United States citizen, such citizenship having been acquired pursuant to the provisions

Amended Complaint

of the 14th Amendment to the Constitution of the United States and Paragraph 9 of Article 1 of the Constitution of the United States and the laws and statutes enacted pursuant thereto.

23. Plaintiff has never performed any act, nor executed any instrument of expatriation. Plaintiff is entitled to be declared a citizen and national of the United States.

34. Wherefore, plaintiff prays for the entry of a judgment and decree:

(a) Declaring him to be a citizen of the United States;
(b) That the proceedings identified as: "In the Matter of Mauro John Montana, Immigration and Nationality file No. A4 973 720", be declared null and void and of no effect;

(c) That the defendants, their agents, attorneys, and servants be restrained and enjoined from taking any action in respect of the proceedings described in Paragraph (b) hereinabove, until the further order of this Court; and

(d) For such other and further relief as may be just and proper in the premises.

Count II

1-19. Paragraphs 1 through 19 of Count I are incorporated by reference as paragraphs 1 through 19 of Count II as though fully re-alleged and set forth.

20. On or about the 15th day of April, 1958, plaintiff applied to the defendant, Attorney General of the United States, for a Certificate of Citizenship under and pursuant to the provisions of Section 341 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1452).

21. On or about the 29th day of September, 1958, said application was denied by the District Director, Immigra-

tion and Naturalization Service on the stated ground
35 that the plaintiff had not established that he acquired
or derived United States citizenship under any pro-
vision of law, which said denial was affirmed by the
Regional Commissioner on or about the 16th day of Octo-
ber, 1958.

22. The said denial and refusal of the defendant,
William Rogers, Attorney General of the United States,
his agents and subordinates to comply with the mandatory
provisions of Section 341 of the Immigration and
Nationality Act of 1952 (8 U.S.C. 1452) on the afore-
stated were arbitrary and capricious and constitute a
denial of the right or privilege of the plaintiff as a
citizen of the United States on the alleged ground that
he is not a citizen of the United States.

23-26. The allegations of paragraphs 20 through 23
of Count I are incorporated by reference as paragraphs
23 through 26 of Count II as though fully re-alleged
and set forth.

Wherefore, plaintiff prays for the entry of a judgment and decree:

- (a) Declaring him to be a citizen of the United States;
- (b) That the proceedings identified as: "In the Matter of Mauro John Montana, Immigration and Nationality File No. A4 973 720", be declared null and void and of no effect;
- (c) That the defendants, their agents, attorneys, and servants be restrained and enjoined from taking any action in respect of the proceedings described in
36 Paragraph (b) hereinabove, until the further order of this Court; and

(d) For such other and further relief as may be just and proper in the premises.

/s/ Anna R. Lavin

Anna R. Lavin,

Attorney for Plaintiff,

Mauro John Montana

One North LaSalle Street
Chicago 2, Illinois
RAndolph 6-7855

James S. Montana, being on oath first duly sworn, deposes and says that he has read the foregoing complaint, knows the contents thereof and that the facts stated therein are true.

/s/ James S. Montana

Subscribed and sworn to before me
this 17 day of March, 1959.

/s/ Faith H. Salk

Notary Public

(Seal)

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UNITED STATES DISTRICT COURT

• • • (Caption—No. 58 C 1620) • •

MOTION

(Filed Mar 30 1959)

Now comes the defendant William Rogers, Attorney General of the United States, by his attorney R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, and moves this Honorable Court for the entry of an order dismissing plaintiff's Amended Complaint on the grounds that the said Amended Complaint fails to state a cause of action in that as to Count 1 there is no allegation that plaintiff has been denied any right or privilege as a national of the United States on the grounds that he is not a national of the

United States and as to Count II which incorporates by reference Paragraphs 1 through 19 in Count I, the said Count II shows on its face that plaintiff was born without the continental limits of the United States in 1906
38 and as a matter of law is not a citizen of the United States by virtue of the several provisions of the United States Statutes and Acts enumerated in Section 341 of the Immigration and Nationality Act of 1952.

(s/) R. Tieken

R. Tieken,

United States Attorney

39-41 • • •

42 IN THE UNITED STATES DISTRICT COURT

Wednesday, April 29, 1959

Present: Honorable Julius H. Miner, District Judge

• • (Caption—No. 58 C 1620) • •

The Court being fully advised in the premises, it is Ordered that the motion of the Government to dismiss Edward P. Ahrens as a party defendant herein be and it hereby is allowed and that said defendant be and he hereby is dismissed from this case, and it is

Further Ordered that the Government's motion to dismiss the amended complaint be and it hereby is overruled as to Count I thereof and sustained as to Count II, and that Count II of the amended complaint be and it hereby is dismissed, and it is

Further Ordered that the Government be and hereby is given, 5 days from this date in which to file an answer to Count I of the complaint and objections to plaintiff's interrogatories, and that hearing on the Government's objections to plaintiff's interrogatories, and that hearing on the Government's objections to plaintiff's interrogatories be and it hereby is set for May 13, 1959, and it is

Further Ordered that this cause be stricken from the trial call of May 11, 1959.

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UNITED STATES DISTRICT COURT

(Caption—No. 58 C 1620)

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S
MOTION FOR DISCOVERY AND PRODUCTION
OF DOCUMENTS.

(Filed May 5 1959)

Now comes the defendant, William Rogers, Attorney General of the United States, by R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division and objects to plaintiff's motion for discovery and production of documents as follows:

1. Defendant objects generally to all demands on the grounds that the documents sought thereby are neither pertinent nor material to the issue of plaintiff's alleged United States citizenship.
2. Defendant objects to those portions of plaintiff's demand enumerated in plaintiff's paragraphs 1, 2, 3 and 4 which called for documents filed, issued or maintained by the Department of State or the Department of Labor, on the ground that neither department is a party to this action.
3. Defendant objects to paragraphs 4 and 5 on the ground that the demands contained therein called for documents and records of the Department of State or the Department of Labor, neither of which are parties to this action.
4. Defendant objects to Paragraph 1 of plaintiff's motion, on the ground that it is too general and further objects to the gratuitous concluding phrase of the said paragraph 1 as being completely lacking in materiality.

5. Defendant objects to paragraphs 2, 3, 4 and 5 on the grounds that they are too general.

6. Defendant objects to paragraphs 1, 2, 3, 4 and 5 of plaintiff's motion on the further ground that they are no more than a fishing expedition interposed for the purpose of delay.

/s/ R. Tieken

R. Tieken,

United States Attorney

Attorney for Defendant

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46 UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

**DEFENDANT'S OBJECTIONS TO PLAINTIFF'S
INTERROGATORIES**

(Filed May 5 1959)

1. Defendant objects to the written interrogatories of plaintiff on the grounds that they are patently lacking in materiality and are propounded solely for the purpose of delay.

2. Defendant objects to Interrogatory No. 1 on the ground that if there was a United States Consul in Naples, Italy, in 1906, that information would be in the possession of the Department of State who is not a party to this cause. Defendant further objects to Interrogatory No. 1 on the ground that the information sought to be obtained thereby is not relevant nor material to plaintiff's cause of action.

3. Defendant objects to Interrogatory No. 2 insofar as it requests information relating to individuals who are, or were, or will be employees of the Department of State, and that neither the Department of State, nor past, present or future employees of the Department of State are parties to this litigation, and defendant further

objects to the breadth of the said interrogatory and
47 states that its patent purpose is interposed for delay
as is demonstrative by the fact that although it re-
quests names, it does not request any addresses.

4. Defendant objects to Interrogatory No. 3 on the
grounds that it is a double question, is vague and calls
for information that is not in the possession of the
Department of Labor which is not a party to this action.

5. Defendant objects to Interrogatory No. 4 in that it
seeks a legal conclusion and an expression of a legal
opinion by the Attorney General of the United States.

/s/ R. Tieken

R. Tieken,

United States Attorney.

Attorney for Defendant

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UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

ANSWER TO COUNT I OF PLAINTIFF'S
AMENDED COMPLAINT

(Filed May 5 1959)

Now comes the defendant, William Rogers, Attorney
General of the United States by his attorney R. Tieken,
United States Attorney for the Northern District of
Illinois, Eastern Division and for answer to Count I of
Plaintiff's Amended Complaint states as follows:

1. Defendant admits the provisions of Section 1503,
Title 8, United States Code and denies this court has
any jurisdiction of this cause thereunder and the plain-
tiff's complaint fails to state a cause of action.

2. Defendant admits the allegations of Paragraph 2
of plaintiff's Count I Amended Complaint.

3. Defendant denies the allegations of Paragraph 3
of plaintiff's Count I Amended Complaint.

4. The matters alleged in Paragraph 4 of plaintiff's Count I Amended Complaint are peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

50. 5, 6, 7, 8 and 9. The matters alleged in Paragraphs 5, 6, 7, 8 and 9 of plaintiff's Count I Amended Complaint are peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

10. 11. For answer to Paragraphs 10 and 11 of plaintiff's Count I Amended Complaint, defendant states that the matters therein alleged are not material and neither admits nor denies the same.

12, 13 and 14. The matters alleged in Paragraph 12, 13 and 14 of plaintiff's Count I Amended Complaint are peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

15. For answer to Paragraph 15 of plaintiff's Count I Amended Complaint, defendant states that the matter therein alleged is not material and neither admits nor denies the same.

16. Defendant admits the allegations of Paragraph 16 of plaintiff's Count I Amended Complaint.

17. For answer to Paragraph 17 of Count I of plaintiff's Amended Complaint, defendant admits that deportation hearing proceedings were commenced on January 15, 1958 and as to the remaining allegations of the said Paragraph 17, if they are factual are too vague to admit of answer.

18. In answer to Paragraph 18 of Count I of plaintiff's Amended Complaint, defendant admits that plaintiff's demand for termination of the proceedings was denied and for further answer to the remaining factual allegations, if any, in Paragraph 18 of Count I of plaintiff's Amended Complaint, states that they are not

material and defendant neither admits nor denies the same.

51. 19. For answer to Paragraph 19 of Count I of plaintiff's Amended Complaint, defendant states that what plaintiff contends on the grounds therefor are peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

20. Defendant admits the factual allegations of Paragraph 20 of Count I of plaintiff's Amended Complaint and for answer to what plaintiff "verily" believes, defendant states that what plaintiff believes is peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

21. Defendant denies the allegations of Paragraph 21 of Count I of plaintiff's Amended Complaint.

22. Defendant denies the allegations of Paragraph 22 of Count I of plaintiff's Amended Complaint.

23. Defendant denies the allegations of Paragraph 23 of Count I of plaintiff's Amended Complaint.

Wherefore, defendant denies that plaintiff is entitled to the relief sought by his prayer of Count I of his Amended Complaint and demands that plaintiff's complaint be dismissed sine die.

/s/ R. Tieken

R. Tieken,

United States Attorney

Attorney for Defendant

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IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

ORDER DIRECTING
PRODUCTION OF DOCUMENTS

(Entered May 13 1959)

This cause coming on to be heard on the motion of the plaintiff, Mauro John Montana, made pursuant to Rule 34 of the Federal Rules of Civil Procedure, and good cause being shown therefore,

It Is Hereby Ordered that the defendant William Rogers, Attorney General of the United States will, on the 27th day of May, 1959, at 3:00 in the afternoon at the office of the United States Attorney for the Northern District of Illinois, 450 U. S. Courthouse, Chicago 4, Illinois, produce and permit the inspection and copying by the plaintiff of the following described documents which may be within his possession

1. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Lena (Madeline) Montana (Mondano) and filed with, or issued by or maintained in any of the agencies of the Department of Justice, for the period commencing September 1, 1905, through and including October 1, 1906.
2. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Mauro John Montana filed with, or issued by, or maintained in any of the agencies of the Departments of Justice for the period commencing September 1, 1905, through and including October 1, 1906.
- 54 3. Certificate of Arrival (Department of Labor) No. 541860 relating to Mauro John Montana.

/s/ Julius H. Miner
Julius H. Miner
Judge

May 13, 1959

TRANSCRIPT OF PROCEEDINGS

1-78 • • •

79 • • • **MADDELENA MONTANA**, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Miss Lavin.

Q. Will you state your name, please?

A. Maddelena Montana.

Q. Would you spell your first name, please?

A. M-a-d-d-e-l-e-n-a.

Q. Are you known by any other name?

A. Lena. They call me Lena for short.

Q. What is your address?

A. 914 West Polk Street.

• • •

By Miss Lavin:

Q. Are you the mother of Mauro John Montana, the plaintiff in this cause?

A. Yes.

80 Q. Mrs. Montana, where were you born?

A. Jersey City, New Jersey.

Q. In what year?

A. 1890.

Q. How long did you live in Jersey City?

A. In Jersey City until I got married.

Q. When was that, Mrs. Montana?

A. I got married the 26th of August.

Q. The 26th of August of what year?

A. 1905.

Q. Whom did you marry?

A. Joe Montana.

Q. Is he known by any other name?

A. No.

Q. Is he known by the Italian equivalent of Joe?

A. Yes.

Q. Is he known as Guiseppe?

A. Yes; that is the Italian.

Q. Where did he reside at that time?

A. Well, before I married him, you mean?

Q. Yes, ma'am.

A. He used to live in Brooklyn.

Q. Do you know how long he had lived there?

A. I guess a couple of years.

81 Q. How long had you known him prior to your marriage?

A. About a couple of years before I was married, a year or so before I was married.

Q. During that time did he reside in Brooklyn?

A. No; then he come to Bayonne.

Q. During the time you knew him prior to your marriage he resided in Brooklyn, New York, or Bayonne, New Jersey, is that right?

A. That is correct.

Q. Mrs. Montana, have you ever been outside the United States?

A. Only once.

Q. When was that?

A. When I was pregnant with my baby.

Q. Could you tell us the approximate date?

A. You mean when I left the United States?

Q. Yes, ma'am.

A. It was about the 15th or 16th of January.

Q. Nineteen hundred and what?

A. 1905.

Q. Was that prior to your marriage? Was that 1906?

A. 1905 or 1906; I don't remember that.

Q. It was after your marriage, though?
82 A. Yes, after my marriage.
Q. Where did you voyage at that time?
A. Where did I what?
Q. Where did you go?
A. When I left the United States?
Q. Yes, ma'am.
A. I went to Italy.
Q. With whom did you travel?
A. Me and my husband.
Q. Do you recall when you arrived in Italy?
A. The 2d of February.
Q. The 2d of February, 1906, is that correct?
A. That is correct.
Q. How long did you remain there?
A. Well, I was there until my baby was born.
Q. When was your baby born?
A. The 26th of June.
Q. What year?
A. 1906.
Q. Had you attempted to return to the United States prior thereto?
A. Yes, I did.
Q. When did you first attempt to return to the United States?
83 A. Well, we were there about a little over a month and a half, and then my mother and father went to this little town for the passports, and I went along with them, so they got their passports, and when it come to mine, they couldn't find no name there, and they said to me I had to go to the American Consul and get my passport to come back, so after two or three days I did.

My mother went with me, because I didn't know anything about Naples.

84 • • • By Miss Lavin:

Q. Mrs. Montana, you went to Naples with your mother, and where did you go when you went to Naples?

A. I went to the American Consul.

Q. What did you do when you arrived there?

A. When I arrived there, there was a man on the outside of the building with some uniform, and he asked me who I wanted to see, and so I told him I wanted to see the American Consul, and he took me in the building, and we went up about three or four steps, and there he introduced me to this young man and he told me that he was the American Consul.

Q. At that time did you have a conversation with
85 this young man?

A. Well, I asked him, I wanted to come back to my place where I was born. I said, "I want to go back to the United States," and he just took one look at me and he says, "I am sorry, Mrs., you cannot in that condition."

Q. What happened then, if anything?

A. He says, "You come back after you get your baby."

Q. You indicated that your mother and father were in Italy at that time. Were they residing in Italy?

A. No.

Q. For what purpose were they in Italy, if you know?

A. Well, my father was away from his people for twenty-five years, you know, and he wanted to go back and see his sisters and brothers.

Q. How long had your mother and father resided in the United States prior to that time?

A. When my father come to the United States?

Q. Yes.

A. He must have discovered it; I don't know.

Q. You don't recall?

A. No, I don't.

86 Q. Was he in the United States prior to your birth?

A. Yes.

Q. Was he a United States citizen, if you know?

A. Yes.

Q. Do you know when he was naturalized?

A. I was a little girl, but I used to hear him talk about it. I think it was 1901 or something like that.

By the Court: I would have to sustain an objection to that. That is not going to prove citizenship, what she thinks. The objection is sustained, and that part may be stricken.

By Miss Lavin: Very well.

By Miss Lavin:

Q. After you visited the American Consulate, what did you do then, if anything?

A. I went back to the little home town.

Q. Do you recall the name of that town?

A. Acerra.

Q. Acerra, Italy?

A. That is right.

Q. How long did you remain there?

87 A. I had to stay until I got my baby.

Q. How long?

A. I should say about four or five months, four months.

Q. With whom did you reside there?

A. With my mother.

Q. With your mother, and was your father still in Italy at that time?

A. When I gave birth?

Q. Yes.

A. No, he had left.

Q. Was your husband in Italy at that time?

A. He left.

Q. When did your husband leave Italy?

A. You mean what day?

Q. Approximately.

A. I couldn't say. I couldn't answer that. I don't remember that.

Q. Was it prior to the birth of the child?

A. Yes.

Q. Can you estimate how long prior to the birth of the child?

A. I should say about a couple of months, a couple of months and a half before I got my baby.

88 Q. After the baby was born, what did you do?

A. I went back to the American Consul and got my passport.

Q. Did you have a conversation with him at that time?

A. Not much. I just asked for my passport.

Q. Did you obtain a passport?

A. I did.

Q. Do you still have that passport?

A. No.

Q. Did the child obtain a travel document?

A. I asked him about my baby's passport, and he said, "You don't need it. It is in your own passport."

Q. Then you returned to the United States. Can you give us the date of your return?

A. No.

Q. How old was the child at that time?

A. The baby was about, I would say about six weeks.

Q. About six weeks old!

A. Yes.

Q. Do you know where your husband went after he left Italy?

89 A. No, I don't know, because we were on the outs. We were not talking.

Q. Do you know whether or not he returned to the United States?

A. That, I know; he come to the United States.

Q. When you came back to the United States, where did you go?

A. Well, we landed in New York, and my daddy was waiting there for me and my mother to take us home.

Q. Where did you proceed to from New York?

A. From New York to Bayonne, New Jersey.

Q. Was that your—

A. My father's apartment.

Q. Did you reside with your husband upon returning to the United States?

A. No.

Q. You are presently residing with him?

A. My mother and father—

Q. You do presently reside with your husband, though, don't you?

A. Today, yes.

Q. How long after you returned to the United States did you resume residing with your husband?

A. I would say about three months later.

90 By Miss Lavin: Mark this as Plaintiff's Exhibit No. 1, for identification.

(Said document was thereupon marked Plaintiff's Exhibit 1 for identification.)

By Miss Lavin:

Q. Mrs. Montana, what was your mother's name?

A. Rosario, and we used to call her Rose, in English, you know, Panico.

Q. And your name is Maddelena Montana, is that correct?

A. That is correct.

Q. When you returned to the United States, what was your age?

A. I don't think I was sixteen.

Q. Did you have more than one child while you were in Italy?

A. No.

Q. Did you give birth to more than one child in the year of 1906?

A. No.

Q. I show you Plaintiff's Exhibit No. 1, for identification, and I ask you to read that, and I ask you if that refers to you and your child? Can you see it?

91 A. I can't read very good. I don't know how to read this.

Q. All right. Did you have a child named Michele Montana?

A. What?

Q. Did you have a child named Michele Montana?

A. No.

Q. Did you travel to the United States on or about September 19, 1906?

A. Yes.

Q. And your name is Maddelena Montana?

A. Yes.

Q. You were then about sixteen years old?

A. That is right.

Q. Your mother's name was Rosario Panico?

A. That is right.

Q. Approximately, what was her age?

A. At that time she must have been, I would say, about fifty.

By Miss Lavin: I offer Plaintiff's Exhibit No. 1 into evidence.

By Mr. Manion: Your Honor, we object on the ground of relevancy and also on the further ground that it 92 is not competent to establish the citizenship. It is neither relevant or competent, your Honor, as proof of the citizenship of Mauro John Montana.

This document relates first to a Michele Montana, and on that ground we would object to its relevancy, on the ground that this matter neither confers citizenship and has nothing whatever to do with it, and we would object to it on the ground of competency.

By the Court: I will reserve my ruling.

By Miss Lavin: May I make a few observations relative to the objection?

By the Court: You certainly may.

By Miss Lavin: This document was produced in response to a subpoena duces tecum for the record of entry of Mauro John Montana, the plaintiff in this cause, and was thus produced by the Government. Relative to the objection of the competency, I would refer the court 93 to the case of Delmore vs. Brownell, 236 F. 2d 598.

By the Court: Aren't you going to argue that at the end of the proof?

By Miss Lavin: Yes.

By the Court: Let's reserve it.

By Miss Lavin: I reoffer Exhibit No. 1.

By the Court: It may be received in evidence subject to the objection.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

By the Court: Did you have it marked?

By Miss Lavin: It has been marked. Strike the identification mark.

By Miss Lavin:

Q. After you resumed residence with your husband, where did you live?

A. In the United States, you mean?

Q. Yes.

A. With my mother and father.

Q. How long did you continue living with your mother and father?

A. About three months.

Q. Where was that?

94 A. That was in Bayonne.

Q. After that where did you reside?

A. The same place in Bayonne, but with my husband after three months.

Q. How long did you reside in Bayonne with your husband?

A. About a year.

Q. After that where did you reside?

A. We came to Chicago.

Q. How long did you reside in Chicago?

A. We are here about fifty-two years.

Q. Did your son Mauro reside with you?

A. Yes.

Q. Until what age?

A. Until he got married.

Q. Do you recall when he was married?

A. He was about 21, I guess.

Q. About 21?

A. Yes.

Q. Would that be about 1927, would that be approximately correct?

A. That is correct.

Q. During the time that he was living with you and your husband, did he ever leave the continental limits 95 of the United States, if you know?

A. No.

Q. After he was married, where did he reside?

A. Well, in Chicago.

Q. Is he still residing in Chicago?

A. He is in LaGrange Park now.

Q. He resides in LaGrange Park?

A. Yes.

Q. Do you know what the address is?

A. No, I don't know the address.

Q. How long has he resided in LaGrange Park?

A. About two years.

Q. Prior to that, did he reside in and about the Chicago area?

A. The Chicago area, yes.

Q. Do you know whether or not he claims LaGrange Park as his residence?

A. Yes.

By the Court: Objection sustained. How can she tell what he claims?

By Miss Lavin: Your Honor, that is the difficulty of proof I have because of the absence of my plaintiff, but it is a jurisdictional allegation, your Honor.

96 By the Court: Objection sustained. She can't say what he claims.

By Miss Lavin: Then I have to ask for a continuance.

By the Court: Pardon?

By Miss Lavin: I would have to ask for a continuance until I can bring in the only person who is competent to say what he claims.

By the Court: Bring him in?

By Miss Lavin: Yes, sir, as he is the only one competent to testify to that.

By Mr. Manion: Your Honor, we have no objection to Mrs. Montana's statement. That is all right with us.

By the Court: Let it stand.

By Miss Lavin:

Q. Mrs. Montana, subsequent to your son's marriage, did you see him often?

A. Every day.

Q. Is that from then to now?

A. Well, yes.

Q. He was in the penitentiary for a period, though, was he not?

97 A. That is right.

Q. During the time he was in the penitentiary, how often did you see him?

A. Every two weeks.

Q. To your knowledge was he ever outside the continental limits of the United States?

A. No.

Q. Mrs. Montana, did your son Mauro ever join any military organizations?

A. What do you call that place?

By Mr. Manion: Ask her a direct question.

By Miss Lavin:

Q. Would the National Guard be correct?

A. The National Guard, that is right.

Q. When did he do that?

A. I would say he was about 17.

Q. Was that while he was residing with you?

A. That is right.

Q. How long was he in the National Guard?

A. About a year.

Q. Does Mauro John Montana have any children?

A. He has four.

Q. What are their names?

98 By Mr. Manion: I would object to this, as to the children.

By the Court: Objection sustained.

By Miss Lavin: May I ask the ground for the objection?

By the Court: Let her put it in the record. Let it go in.

By Mr. Manion: All right, your Honor.

By the Witness:

A. Joe.

By Miss Lavin:

Q. How old is he?

A. He is about 31 or 32.

Q. Was the son Joe ever a member of any military organization?

By the Court: Objection sustained. That certainly has no bearing on it.

By Miss Lavin: Your Honor, it is my obligation to show allegiance.

By the Court: Not by his children 36 years old, or 32.

By Miss Lavin: May I make the further offer of proof that at the age of 17 this child was allowed to join 99 the National Guard through permission given by his father, as were all the other sons?

By Mr. Manion: Your Honor, I don't see the relevancy. We are talking about Mauro John Montana, whether or not he is a citizen.

By the Court: That is right.

By Mr. Manion: A person can't come into the country and say, "I swear allegiance to you," and thereby become a citizen.

By the Court: Yes.

By Miss Lavin: I will make the observation, assuming the court accepts one of the several arguments that will be advanced, that there is a showing of allegiance, a manifestation of allegiance, and that there has been no renunciation of allegiance, and I can only do that by the circumstances and the manner in which he lived.

By the Court: Objection sustained.

By Miss Lavin:

Q. Referring back to the time that you were in Italy and prior to the birth of your son Mauro, you indicated your husband returned to the United States?

100 A. He returned with my father.

Q. And that was, I don't recall, how long prior to the birth of the child, did you say?

By the Court: About two and a half months.

By the Witness:

A. Yes, about two and a half months.

By Miss Lavin:

Q. Do you know for what purpose he returned to the United States?

A. He returned—we had a argument, and we weren't talking, so he just left.

Q. When you returned to the United States and you took up residence in your family's house, was your husband then living with you?

A. No.

Q. And that condition existed for how long after?

By the Court: Three months, she said.

By the Witness:

A. About three months.

By Miss Lavin: I have no further questions.

By Mr. Manion: Your Honor, the Government at this time renews its objection to the testimony of Mrs. 101 Montana as to her conversations with anybody in Italy whom she represents to have been a Consul of the United States, and further objects to all of that testimony, because the only testimony Mrs. Montana has given is that she had a baby in Italy, and she has in no way linked up the baby she had in Italy with the plaintiff in this action.

It is not relevant, and at this time the Government renews its objection and moves it be stricken.

*By the Court: She did testify under oath that it was the same child. I can't strike that. That is admissible.

By Mr. Manion: I didn't hear her say that the child that she had in Italy is the plaintiff in this action. I don't believe she said that.

By the Court: I think she said there was only one child born that year. Ask her.

By Miss Lavin: All right.

102 By Miss Lavin:

Q. Referring to the child that was born in Italy in 1906, what is the name of that child?

A. Mauro John Montana.

Q. Is that child the plaintiff in this case?

A. That is right.

103 * * *

104 *Cross Examination by Mr. Manion.*

Q. Mrs. Montana, can you recognize the signature of your son?

A. No.

Q. You don't believe you could?

A. No.

By the Court: How many children have you?

By the Witness: I have six living, your Honor.

By the Court: How many boys?

By the Witness: Five sons.

By the Court: How old are they?

By the Witness: 53, and then another one is 49, 47, 45, 33 and 42.

By the Court: All boys?

By the Witness: Five boys, your Honor.

By the Court: And the one next to the plaintiff is how old now?

By the Witness: 49.

By the Court: 49?

By the Witness: Yes.

By the Court: He was born where?

105 By the Witness: In Chicago. They are all born in Chicago.

By the Court: All were born in Chicago except the plaintiff?

By the Witness: That is right.

By the Court: All right; proceed.

By Mr. Manion: We have no further questions of Mrs. Montana, your Honor.

By Miss Lavin: You may step down.

(Witness excused.)

By Miss Lavin: The plaintiff rests.

By Mr. Manion: Your Honor, the Government renews its motion for judgment, verdict and judgment on the lack of showing.

By the Court: I will hear you, Miss Lavin. Do you have any other proof to offer?

By Miss Lavin: No, your Honor, I don't think so.

By Mr. Manion: Your Honor, we would rest at this time.

By the Court: You stand on the record, and you have no other evidence?

By Mr. Manion: That is correct, your Honor.

By the Court: All right.

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106-123 • • •

124 • • • By the Court: I think I understand the problem and am familiar with the statutes, and the suit will be dismissed.

By Mr. Manion: Thank you.

By Miss Lavin: Your Honor, I have a very serious problem here, and that is the problem of appeal. I would like for you to stay the execution of your order pending appeal. That won't upset your order in any way.

By the Court: That will be up to the Court of Appeals, not me.

By Miss Lavin: Then I would make application for an injunction against the District Director to forego 125 executing the order of deportation.

By the Court: That will be denied.

By Miss Lavin: Pending appeal.

By the Court: It is up to the Circuit Court of Appeals to issue supersedeas if they want. It is up to them.

By Miss Lavin: I don't want to be put in the position in the Court of Appeals in not having advanced an argument to your Honor that this is a difficult problem as most problems on nationality are. I would like, of course, for your Honor to change his position, but I would certainly appreciate the opportunity of advancing my arguments in the form of a brief.

By the Court: You have your record, and I have let you put everything else in there. It is up to you to go to the Court of Appeals.

126-127 • • •

55 IN THE UNITED STATES DISTRICT COURT

Monday, November 16, 1959

Present: Honorable Julius H. Miner, District Judge

• • (Caption—No. 58 C 1620) • •

This cause being called for trial the parties come by their attorneys and the issues being joined the trial proceeds and at the conclusion of all the evidence the defendant William Rogers, Attorney General of the United States, moves for judgment in his favor, whereupon the trial continues, and the Court having now heard all the evidence adduced for the parties and arguments of counsel and being fully advised hands down his decision orally from the bench, counsel for the defendant to present proposed findings of fact and conclusions of law and judgment order on November 20, 1959, and it is

Ordered that plaintiff's motion for a stay order, pending appeal, be and it hereby is denied.

56

UNITED STATES DISTRICT COURT

• • (Caption—Civil No. 58 C 1620) • •

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW
(filed November 20, 1959)

Findings of Fact

1. Plaintiff is a resident of the Northern District of Illinois who commenced the instant proceeding under the

provisions of Sections 1452 and 1503 of Title 8, United States Code seeking a judicial declaration of plaintiff's citizenship as a United States citizen.

2. Plaintiff's mother, Madeline Montana, was born on October 2, 1890, at Jersey City, New Jersey, and has since that date continuously been a native and citizen of the United States of America, who has never surrendered or lost her citizenship, or expatriated herself.

57 3. Plaintiff's father, Joseph Montana, was born in Accera, Italy, and has been since his birth continuously a native and citizen of Italy.

4. Plaintiff was born on June 26, 1906, in Accera, Italy.

5. Plaintiff entered the United States of America on September 19, 1906 when he was approximately three months old, having been brought to the United States from Italy by his mother, Madeleine Montana.

6. Plaintiff has continuously resided in the United States since that time and has never been naturalized or otherwise declared by legally constituted authority to be a citizen of the United States.

Conclusions of Law

1. This court has jurisdiction over the parties to this action and the subject matter hereof.

2. Plaintiff's status as a citizen must be determined in accordance with the requirements of the law that was in effect at the time of his birth.

3. Plaintiff is not a citizen by virtue of any provision of the Constitution of the United States of America, having been born outside of the territorial limits of the United States.

4. Plaintiff is not a citizen by virtue of any statutory enactment of the Congress of the United States of America, the relevant provision in effect at the

time of plaintiff's birth providing that United States citizenship only descended to a child born outside of the limits and jurisdiction of the United States through the child's father, no provision having been made for children born outside the limits and jurisdiction of the United States but whose mothers were.

5. Plaintiff has failed to sustain the burden of proving himself to be a citizen of the United States of America.

Enter:

/s/ J. H. Miner
Judge

Dated: Nov 20 1959

59 IN THE UNITED STATES DISTRICT COURT

• • (Caption—Civil No. 58 C 1620) • •

NOTICE

(Filed Dec 1 1959)

Notice Is Hereby Given that the plaintiff, Mauro John Montana, appeals to the United States Court of Appeals for the Seventh Circuit from the findings of fact, conclusions of law and judgment order entered by the court below on the 20th day of November, 1959. The attorney for the plaintiff, Mauro John Montana, is Anna R. Lavin, 209 South LaSalle Street, Chicago 4, Illinois. The attorney for the defendant, William Rogers, Attorney General of the United States, is Robert Tieken, 450 U. S. Court House, Chicago 4, Illinois.

/s/ Anna R. Lavin

Dated: December 1, 1959.

60-65 * * *

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[fol. 41]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAURICE JOHN MONTANA, Plaintiff,
vs.

WILLIAM ROGERS, Attorney General
of the United States, Defendant.

COMPLAINT—Filed September 3, 1958

Now comes the plaintiff, Maurice John Montana, by his attorney, Anna R. Lavin, and complaining against the defendant William Rogers, as Attorney General of the United States, in complaining says:

1. The jurisdiction of this Court is invoked and these proceedings are instituted against the defendant under Section 1503 of Title 8 of the Nationality Act of 1952 (8 U. S. C. 1503, for a judgment declaring the plaintiff to be a citizen and national of the United States of America.
2. Defendant is the duly appointed, qualified and acting Attorney General of the United States. The Immigration and Nationality Service is a department of the defendant and under his direction and control.
3. Plaintiff is the true and lawful blood child of Maddelena Montana, who is a native born citizen of the United States.
4. Maddelena Montana was born in Jersey City, New Jersey, on the 2nd day of October, 1890 of Giovanni Mondano and Rose Mondano, his wife, both of whom were naturalized citizens of the United States at the time of [fol. 42] the birth of the said Maddelena Montana.
5. Maddelena Mondano has, since the 2nd day of October, 1890, to the present day, been continuously a resident of the United States.

6. On or about the 3rd day of January, 1905, the said Maddelena Mondano married one Giuseppe Montana in Bayonne, New Jersey.

7. The said Maddelena Montana journeyed to Italy on or about the 2nd day of February, 1906, accompanied by her husband and her parents as aforesaid. She departed from New York City in January of 1906; at which time she was already pregnant with said child and on February 2, 1906, when she arrived at Naples, Italy, her pregnancy was in the fifth month.

8. That approximately two months thereafter she attempted to return to the United States and was prevented from so doing by and through the actions of the then acting and duly constituted American Consul, the highest ranking United States official in the province of Naples, Italy, where she was visiting.

9. The prohibition of the aforesaid American Consul continued to, and included, approximately the 30th day of July, 1906.

10. That, theretofore, on, to-wit the 26th day of June, 1906, there was born to the said Maddelena Montana, at Acerra, Italy, a son, Mauro John Montana, the plaintiff herein.

11. That on or about the aforesaid 30th day of July, 1906, Maddelena Montana entered the United States traveling on a United States passport, recognizing her as a citizen [fol. 43] of the United States, accompanied by the plaintiff whose name and/or description was endorsed on the said United States passport.

12. That, from the 30th day of July, 1906, to the present, the plaintiff has never been without the continental limits of the United States.

13. That on the 1st day of August, 1924, and other times prior and subsequent thereto, the plaintiff had and has pledged allegiance to the United States of America and has renounced all foreign sovereigns, powers and potentates.

14. That on or about the 7th day of January, 1958, the plaintiff was served by the Immigration and Nationality Service, with an order to show cause why he should not be deported which said order to show cause is incorporated and identified in immigration file No. A4 973-720.

15. That deportation hearing proceedings commenced on the 15th day of January, 1958; that, from the inception of that hearing, questions as to the jurisdiction of the hearing officials was raised and eventually affirmatively challenged with a demand for termination of said immigration proceedings because of the claimed United States citizenship of the plaintiff.

16. The plaintiff's demand for termination of the immigration proceedings seeking deportation, on the ground of want of jurisdiction because of his citizenship of the United States, was denied and the hearing proceeded, with the plaintiff refusing to take further part thereafter.

17. The plaintiff contends that the denial and refusal of [fol. 44] the Immigration and Nationality Service at Chicago, Illinois to terminate the deportation proceedings, on the ground that he was a citizen of the United States, is a denial of his right as a citizen of the United States. The plaintiff verily believes that the defendant intends to continue on with said deportation proceedings and will so do, unless restrained by an injunction of this Court.

18. Plaintiff Mauro John Montana is a permanent resident of the Village of La Grange, within the Northern District of Illinois and claims his permanent residence within the jurisdiction of this Court.

19. Plaintiff is a United States citizen, such citizenship having been acquired pursuant to the provisions of the 14th Amendment to the Constitution of the United States and Paragraph 9 of Article 1 of the Constitution of the United States and the laws and statutes enacted pursuant thereto.

20. Plaintiff has never performed any act, nor executed any instrument, of expatriation. Plaintiff is entitled to be declared a citizen and national of the United States.

Wherefore, plaintiff prays for the entry of a judgment and decree:

- (a) Declaring him to be a citizen of the United States;
- (b) That the proceedings identified as: "In the Matter of Mauro John Montana, Immigration and Nationality file No. A4 973 720", be declared null and void and of no effect;
- (c) That the defendant, his agents, attorneys, and servants be restrained and enjoined from taking any action in respect of the proceedings described in Paragraph (b) hereinabove, until the further order of this Court; and
- [fol. 45] (d) For such other and further relief as may be just and proper in the premises.

Anna R. Lavin, Attorney for Plaintiff, Mauro John Montana.

One North La Salle Street, Chicago 2, Illinois, RA 6-7855.

Duly sworn to by Mauro John Montana, jurat omitted in printing.

[fol. 46]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 58 C 1620

MAURO JOHN MONTANA, Plaintiff,

vs.

WILLIAM ROGERS, Attorney General of the United States,
and EDWARD P. AHRENS, District Director of Immigration
and Naturalization, Chicago, Illinois, Defendants.

INTERROGATORIES—Filed March 17, 1959

The following Interrogatories are to be answered separately and fully in writing and under oath within fifteen days after the service hereof:

1. Please state the name and present address of the person who was United States Consul at Naples, Italy from January 1, 1906 to October 1, 1906.

2. Please state the name or names of any present or former employee or employees of the Immigration and Nationality Service, the Consular Service of the United States, and the State Department, who have knowledge and information regarding any passport, application or applications [fol. 47] therefor, visa or visas, or application or applications therefor by, or on behalf of Lena (Madeline) Montana (Mondano) and/or Mauro John Montana and/or any child of Lena (Madeline) Montana (Mondano) during the period commencing September 1, 1905 through and including October 1, 1906.

3. Please state when or on or about what date Certificate of Arrival (Department of Labor) #541860 relating to Mauro John Montana was composed; and the source of the information thereon and therefor.

4. Please state whether or not between the period beginning January 1, 1906 to October 1, 1906, a citizen of the United States required a Passport or other Travel Document to obtain transportation and to travel from Naples, Italy to the United States.

Anna R. Lavin, Attorney for Plaintiff, Mauro John Montana.

[fol. 48]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 58 C. 1620

MAURO JOHN MONTANA, Plaintiff,

vs.

WILLIAM ROGERS, Attorney General of the United States,
and EDWARD P. AHNENS, District Director of Immigration
and Naturalization, Chicago, Illinois, Defendants.

Excerpts From Transcript of Proceedings

Transcript of Proceedings had in the above-entitled cause
before the Honorable Julius H. Miner, one of the judges
of said court, in his court room in the United States Court
House at Chicago, Illinois, Friday, February 27, 1959, at
10:00 o'clock a.m.

APPEARANCES:

Miss Anna R. Lavin (Suite 1045, 209 S. LaSalle St.,
Chicago 4, Illinois), on behalf of Plaintiff.

Hon. Robert Tieken, United States Attorney, by Donald
S. Manion, Esq., on behalf of Defendants.

And thereupon the following further proceedings were
had herein:

[fol. 49] By the Clerk: 58 C 1620, Montana vs. Rogers.

By Miss Lavin: If it please your Honor, this is at this
time a petition for temporary injunction pending the dis-
position of the case now pending before your Honor for
a declaratory judgment of American citizenship. The
petition for the restraining order alleges that on Jan-
uary 7, 1958, this plaintiff was served with an order to

show cause why he shouldn't be deported; that deportation proceedings commenced on the 15th day of January; that in the course of the deportation proceedings this man made an affirmative claim to American citizenship.

Subsequently, on the 29th day of August, again in 1958, a final order of deportation issued. On the 3rd day of September the suit that is now pending before your Honor was instituted in this court.

[fol. 50] By the Court: If I give the petitioner a limited time for discovery and for trial, would you agree to more time without an injunction?

By Mr. Manion: Your Honor, it is just a matter of a policy. May I say to the court that no action will be taken against Mr. Montana at all pending the determination of whatever this court has.

By the Court: That is all I want.

By Mr. Manion: We can't agree to that. We don't want to be in a position of agreeing to that.

By the Court: I will not issue the injunction against the Attorney General, but I will limit their time and I will set this case down for hearing within sixty days. They can go ahead with the discovery all they want, with all the preparation. Nothing is shown to me to indicate any need for the petitioner's own testimony except the oath of allegiance, and in that situation I don't think it makes any difference. Taking an oath wouldn't make him a citizen.

[fol. 51] That is purely a matter of law.

I am not clear on whether or not any detention in Italy, physical loss, or anything else, would change the law at all and to strike the citizenship of the child born in Italy.

By Miss Lavin: Your Honor understands that while we do claim estoppel, we are proceeding on pure law in this case. We are not relying on simple estoppel. We think it is a consideration, but it is our position and very, a very carefully considered position that this man was under the law a citizen of the United States at the time he was born.

By the Court: In Italy?

By Miss Lavin: At the time he was born in Italy, yes, sir.

By the Court: Well, what is your theory?

By Miss Lavin: The theory is the carrying forward of the Act of 1802 unrepealed by the Act of 1855 which Mr. Manion read to you, and as a matter of fact, every place I have read carried forward not directly contradictory, under the further theory of the Act of 1897 when the citizen mother had domination of the child and resumed her residence in the United States. [fol. 52]

By the Court: Does that confer citizenship on the child?

By Miss Lavin: That was the theory of the Guest case.

By the Court: By the Act?

By Miss Lavin: Yes, physical domination.

By the Court: Can we reduce this now to the stipulated question of facts and briefs?

By Miss Lavin: Your Honor, I consider that the briefs are going to be extensive in this case and certainly are going to take up much more of the court's time than the trial of the issues.

What is your position on the situation?

By Mr. Manion: Oh, I think we can get together to stipulate to things, yes, ma'am.

By Miss Lavin: Well, isn't it entirely conceivable that if the government comes forward with what records the Department of State has, we might be in a better position to stipulate to everything.

By Mr. Manion: This is the first time I knew that you wanted any documents.

By Miss Lavin: Oh, no. I spoke to you about that in [fol. 53] your office, Mr. Manion.

By Mr. Manion: I am sorry, I don't recollect that, if you did.

By Miss Lavin: I assure you, sir, I did.

By Mr. Manion: I don't remember that, but if you want the documents I would be delighted to try to obtain them for you.

By Miss Lavin: Fine. I will give you a copy of our request served on the Immigration, and that will expedite it.

By the Court: What will happen to the government's statement that it does not intend to take any action?

By Mr. Manion: Your Honor, can I further say that

after all, the Immigration—this is not a country of barbarians. The man is sick and the Immigration and Naturalization service regardless, however they may be characterized by the plaintiff, they are still United States citizens. They are like other United States citizens. They are, I think, motivated primarily by a sense of justice.

By the Court: All right, I am accepting your assurances on the record.

I will deny the motion for a temporary injunction.
[fol. 54] By Miss Lavin: The restraining order expires on its own power today.

By the Court: I beg your pardon?

By Miss Lavin: The restraining order expires on its own power today. It was extended to today.

Would you make provisions for the return of this surety, security, that was put up during the pendency of that order?

By the Court: Yes, I will provide for that and I will set the matter down here in sixty days.

By the Clerk: April 27th?

By the Court: April 27th, at which time you may offer any proof that you wish and then further discuss the question of the law on the facts. I don't think I can ask the government to stipulate on any opposition to a return here in 1906.

By Miss Lavin: 1905, 5 and 6; it was 1906.

By the Court: Pardon?

By Mr. Manion: 1906.

By Miss Lavin: It was 1906.

By Mr. Manion: We have taken Mrs. Montana's deposition, your Honor.

[fol. 55] By the Court: You have taken it?

By Mr. Manion: We have taken it, and after reading that, I don't feel I would want to stipulate as to the circumstances surrounding Mrs. Montana. I would not want to.

By the Court: You couldn't stipulate. I would not ask you to.

By Mr. Manion: No, your Honor.

By the Court: That will be the order.

By Miss Lavin: The time for hearing, your Honor, is April 27th.

By the Clerk: April 27th.

By the Court: April 27th.

By Mr. Manion: Thank you, your Honor.

[fol. 56] By the Court: All you have to do is briefly state what you have told me. That is the law. I can't by any stretch of the imagination consider your point of view. To me, it is not retroactive.

It is very clear that the father is not a citizen, was [fol. 57] not a citizen at the time the child was born. There is no question about it in my mind. He isn't a citizen now.

By Mr. Manion: That is correct, your Honor.

By the Court: Submit it to Miss Lavin.

By the Clerk: Do you want to fix a date on that?

By the Court: Friday morning.

[fol. 58]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1959—April Session, 1960.

No. 12851

MAURO JOHN MONTANA, Plaintiff-Appellant,

v.

WILLIAM P. ROGERS, Attorney General of the
United States, Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

OPINION—April 29, 1960

Before Hastings, Chief Judge, Duffy and Knoch, Circuit Judges.

HASTINGS, Chief Judge. This declaratory judgment action was brought in the district court under the provisions of Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1503. Mauro John Montana, plaintiff-appellant (plaintiff), initiated this suit to determine his citizenship, a controversy having been precipitated by an administrative order for his deportation. William P. Rogers, Attorney General of the United States, is defendant-appellee.

The facts of the case are simple and not in dispute—plaintiff was born in Italy in 1906, the son of an alien father and a citizen mother. He claims he is a citizen of the United States. The application of the proper law to this factual situation is the controlling consideration before us. [fol. 59] The record reveals the following events. Maddelena Montana, mother of plaintiff, was born in Jersey City, New Jersey, in 1890. Her father was a naturalized American citizen. She lived in Jersey City until her marriage on August 26, 1905, to Giuseppe (Joe) Montana, father of plaintiff. Giuseppe Montana was born in Italy; prior to his marriage, he had resided in either Brooklyn, New York or Bayonne, New Jersey without acquiring citizenship status in the United States.

On the 15th or 16th day of January, 1906, Maddelena and Giuseppe Montana left the United States en route to Italy, where they arrived on February 2, 1906. The purpose of their trip was to join Maddelena's parents who were visiting relatives in Italy. At the time she departed from the United States, Maddelena Montana was about four months pregnant.

Maddelena, the sole witness in the declaratory judgment action under review (plaintiff's illness precluded his testifying; the government offered no evidence), testified as to these subsequent events. About a month and a half after arriving in Italy, Maddelena, wishing to return to the United States, accompanied her parents to a "little town" to obtain passports. Her parents secured their passports, but the official on duty was unable to find her name. He informed Maddelena that she must see the American Consul to get her passport. Two or three days later Maddelena and her mother traveled to the American Consulate

in Naples. According to her testimony, Maddelena said, "I want to go back to the United States and [the Consul] just took one look at me and he says, 'I am sorry, Mrs., you cannot go in that condition ***. You come back after you get your baby.'" After this visit to the American Consulate Maddelena went to Acerra, Italy where she resided with her mother and where the plaintiff was born on June 26, 1906.

In late March or early April, 1906, Giuseppe Montana had returned to the United States. Maddelena stated that at this time they "were on the outs. We were not talking."

After the birth of plaintiff, Maddelena returned to the American Consul from whom she secured a passport. She stated she had "not much" conversation with the Consul, but "asked him about my baby's passport, and he said, 'You don't need it. It is in your own passport.'" [fol. 60]. Maddelena, with plaintiff and his grandmother, then returned to the United States. The records of the Immigration Service, produced at the trial reveal that plaintiff (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother and alien grandmother.

After arrival in this country, plaintiff lived for three months with Maddelena and her parents. Thereafter, until his marriage in 1927, he lived with both parents who had become reconciled. After his marriage, and continuing to date, plaintiff has resided with his own family in the Chicago, Illinois, area. At no time has he instituted naturalization proceedings.

On January 7, 1958, plaintiff was served by the Immigration and Nationality Service with an order to show cause why he should not be deported. After an administrative hearing, an order directing his deportation became final on August 29, 1958. On September 3, 1958, plaintiff commenced the instant declaratory judgment action to define his citizenship status, to declare the deportation proceedings null and void, and to restrain defendant from taking any action on the basis of such proceedings.

In action relevant to this appeal, the district court, after a trial on the merits, entered judgment in favor of de-

fendant and dismissed the complaint, from which judgment this appeal is taken.

On the basis of the described facts, plaintiff offers six theories which he contends establish his citizenship. His central argument revolves around the applicable statutory law in existence at the time of his birth. Plaintiff asserts that he became a citizen at birth by the operation of Section 2172 of the Revised Statutes of the United States.¹ The Attorney General contends that Section 1993 of the Revised Statutes exclusively and precisely controls the [fol. 61] factual situation in question here and that citizenship under that section can be conferred to a child born abroad *only if the father was a citizen*.

Both Sections 2172 and 1993 were enacted as a part of the Act of June 20, 1874, 18 Stat. ch. 333, a comprehensive codification of all laws (including existing nationality statutes) which repealed prior laws. No other relevant statutes were enacted prior to plaintiff's birth in 1906. Section 2172, as enacted, was substantially identical to Section 4 of the Act of 1802, 2 Stat. 155 (see 8 U.S.C.A. §§ 1-18, Historical Note). Section 1993 reenacted the Citizenship Act of 1855, 10 Stat. 604.

Congress had passed the Act of 1855 in response to an article by Mr. Horace Binney in 2 American Law Reports (1854) in which Mr. Binney declared that the Act of 1802 was retrospective in application; that the phrase "children of persons who now are, or have been, citizens of the United States" is operative *only* to persons born prior to

¹ Section 2172, Rev. Stat. § 2172 (1875), provided in relevant part:

"* * * and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens * * *." (Emphasis added.)

² Section 1993, Rev. Stat. § 1993 (1875), provided:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were, and may be at the time of their birth, citizens thereof, are declared to be citizens of the United States; but rights of citizenship shall not descend to children whose fathers never resided in the United States." (Emphasis added.)

the Act of 1802; and that there were no operative statutes covering similar situations subsequent to 1802. The Act of 1855 remedied that defect. See *United States v. Wong Kim Ark*, 169 U.S. 649, 665, 673, 674 (1898); *Weedin v. Chin Bow*, 274 U.S. 657, 663, 664 (1927). That statute provided that persons "heretofore or hereafter" born abroad of *citizen fathers* (when such fathers had resided in the United States) were declared to be citizens of the United States. This Act expressly operated retrospectively and prospectively, but no repealer of the Act of 1802 was provided.

This provision was reenacted by the Act of 1874 and appeared as Section 1993 of the Revised Statutes. It expressly applied prospectively and retrospectively. However, plaintiff contends that Section 2172, reenacted concurrently, operated prospectively and is the basis for declaring his citizenship.³ It is true that Section 2172 was not expressly limited to certain factual situations in point of time prior to 1802. The lack of such limiting language may have been due to inadvertence. It may have been enacted to apply to situations between 1802 and 1855. Cf. [fol. 62] *Wong Kim Ark*, 169 U.S. at page 674. It may have been reenacted merely to save rights of citizenship which accrued prior to 1802.

In any event, considering both sections of the Act of 1874, we hold that Section 1993 applies exclusively to the factual situation before us. Since plaintiff's father was not a citizen of the United States, no rights of citizenship descended to plaintiff at birth. This determination is consistent with the holdings in *Mock Gun Ying v. Cahill*, 9 Cir., 81 F. 2d 940 (1936); and *Anthony D'Alessio v. John M. Lehman, District Director of Immigration and Naturalization Service*, N.D.D.C. Ohio, — F. Supp. — (Feb. 26, 1960).

Plaintiff advances other theories of citizenship based on statutory grounds. They can be rejected summarily. Plaintiff argues that citizenship vested in him under Section

³ Plaintiff construes the provision "the children of persons" to apply in the distributive and not to require both parents to be citizens; and "now are or have been" * * * born" to operate both prospectively and retrospectively.

1993, *supra*, since at birth he was in the sole custody of his mother (his father having returned to the United States). However, the Department of State ruling he relies upon relates to illegitimate children who do not have a father in contemplation of law. In addition, plaintiff argues that Section 1 of the Act of 1934, 48 Stat. 797, (which grants citizenship to infants born abroad to either a citizen father or mother) is prospective and retrospective in operation and that it is merely declaratory of existing law. But an examination of this section reveals that it is expressly limited in its operation to children "hereafter born" abroad. Finally, plaintiff argues that he gained citizenship by the terms of Sections 3 and 5 of the Act of March 2, 1907, 34 Stat. 1228, 1229. This act denationalized American women who married aliens and provided that minor children born abroad of such alien parents should be deemed citizens of the United States upon the resumption of American citizenship by the mother. However, in this case plaintiff's mother never lost her citizenship, and there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization. See *In re Wright*, E.D.D.C.Pa., 19 F. Supp. 224 (1937).

Plaintiff has advanced a novel constitutional argument that Fourteenth Amendment rights of citizenship attach at the moment of conception and that since plaintiff was conceived in the United States, he is a citizen. Whatever [fol. 63] rights might accrue to an unborn child by the operation of the common law and by statute, it is clear that the Fourteenth Amendment limits citizenship to persons "born" in the United States."

Further, the action of the American Consul in Naples (even if one is fully to believe Maddelena) in refusing to issue a passport is not sufficient, as a matter of law, to grant citizenship to plaintiff. The cases cited by plaintiff relate to native-born citizens; the issues there were voluntary expatriation. These holdings do not control the situation before us. See *Dos Reis v. Nicolls*, 1 Cir., 161 F. 2d 860 (1947); and *Podea v. Acheson*, 2 Cir., 179 F. 2d 306 (1950).

Finally, even if the action of Immigration officials (the record of such action was introduced at trial) was suffi-

cient to establish a *prima facie* case of plaintiff's citizenship, it was rebutted convincingly by the showing that the Immigration officers committed legal error in designating plaintiff as a citizen at the time of his entry. See *Lee Hon Lung v. Dulles*, 9 Cir., 261 F. 2d 719 (1958); and *Delmore v. Brownell*, 3 Cir., 236 F. 2d 598 (1956). Such designation of plaintiff's citizenship was neither the formal adjudication in *Lung* nor the considered determination in *Delmore*.

The judgment of the district court is

Affirmed.

[fol. 64]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 12851

MAURO JOHN MONTANA, Plaintiff-Appellant,

vs.

WILLIAM P. ROGERS, Attorney General of the
United States, Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

JUDGMENT—April 29, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

[fol. 65].

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—May 26, 1960

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fol. 66] Clerk's Certificate (omitted in printing).

[fol. 67]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—October 17, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.